

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540

MARTIN
12-11

7546

FILE: B-191655

DATE: September 5, 1978

MATTER OF: Office & Interior Furnishings

DIGEST:

07275

1. Where manufacturer's product is identical to product offered by dealers under different labels or in different packages, award of only one FSS Supply Schedule Contract for that product is reasonable exercise of GSA administrator's authority under 40 U.S.C. 481 to prescribe policies for economic and efficient procurement.
2. Fact that only one contract will be awarded for the product of a particular manufacturer does not of itself prevent small business concerns from receiving a fair share of Government's contracts under set-aside program or from competing on equal footing with large business concerns.

Office & Interior Furnishings protests under invitation for bids (IFB) No. FPHO-P-29818-N-18-78 issued by the Federal Supply Service (FSS), General Services Administration (GSA), Washington, D.C.

So far as is pertinent here, the solicitation calls for bids to provide for one year the typewriter ribbon requirements of various Government agencies under a multiple award schedule contract. After issuance of the solicitation, FSS notified the protester that not more than one award for identical items would be made in connection with this procurement. This notification was issued pursuant to FSS Procurement Letter No. 240, August 5, 1977 which, in part, reads as follows:

" 5A-73.303-3 Identical products

"(a) Normally, a multiple award Federal Supply Schedule contract for a specific product shall be entered into with only one contract source. For example, if the item is contracted for with a manufacturer, the same item shall not be contracted for

with a dealer. Where only offers from dealers are involved, and it is found that more than one dealer has made offers on the same product, only one contract will be entered into for that specific product. When offers for identical products are identified (see par. (b), below), negotiations will be conducted with each of the offerors. The most favorable offer to the Government will be the offer which is accepted."

The protester believes this practice limits competition for typewriter ribbons to the manufacturers of such ribbons and effectively eliminates the private label dealers who, it asserts, can provide better service, training, guarantees and prices. It argues this practice arbitrarily eliminates small businesses from participating in the FSS multiple award contracts and violates the mandate of the Small Business Act, 15 U.S.C. 631 (1964) that small businesses receive a fair portion of the purchases and contracts for property and services for the Government. The protester further contends that FSS policy does not comply with the statutory authority of the Administrator, GSA under 40 U.S.C. 481 to prescribe policies and methods of procurement because it was not prescribed "with due regard to the program activities of the agencies."

GSA states that prior to Procurement Letter No. 240, the FSS procurement personnel relied upon an unwritten policy of never placing two identically labeled or packaged items on a schedule, but were treating differently labeled or packaged items of the same product as distinct items. Consequently, they often awarded several contracts on the FSS multiple award schedules for the same product produced by the same manufacturer. This resulted in an increased administrative workload and in the Government paying different prices for the same item based upon the respective discounts from established commercial prices received from each offeror. GSA states the FSS policy provides that all identical items which are produced by the same manufacturer will be treated and evaluated as identical whether the products are offered by the

manufacturer or indirectly by a dealer. It states that the policy will not have the effect of considering every manufacturer's product as identical to another manufacturer's product. GSA contends that greater competition, economy and efficiency will be realized when dealers of a manufactured product compete for the contract with the product manufacturer.

GSA further contends that this policy does not prohibit small business from participating and is not inconsistent with the expressed intent of the Small Business Act that a fair portion of purchases and contracts for property and services for the Government will be placed with small business. How to implement this declaration of purpose, it submits, is committed to the discretion of the procurement agencies and, absent any abuse of that discretion, should be left undisturbed.

The Federal Property and Administrative Services Act of 1949, 40 U.S.C. 481 provides, in part, that:

"(a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency of service, and with due regard to the program activities of the agencies concerned--

"(1) prescribe policies and methods of procurement and supply of personal property and nonpersonal services " * * *."

In our opinion, Procurement Letter No. 240 represents a reasonable exercise of the authority granted by this statute to the Administrator of GSA and reflects due regard for the program activities of GSA and the Small Business Administration (SBA). While, as the protester contends, it is the policy of the Government to award a fair proportion of purchases of supplies and services to small business, this policy is implemented by the set-aside program under which individual procurements or classes of procurements are set aside for exclusive small business participation. The fact that only one

B-191655

4

contract will be awarded for the product of a particular manufacturer does not of itself prevent small business concerns from receiving a fair share of the Government's contracts through the set-aside program. Moreover in those procurements which are not set-aside, such as the one involved here, small business concerns are free to compete on equal footing with large business concerns.

The fact that dealers may, as the protester contends, provide additional services or shorter delivery than the manufacturer is not relevant unless such service or delivery is actually needed and specified in the solicitation. Generally, acquisition of higher priced supplies or services which may be considered superior but are in excess of an agency's minimum needs is not authorized. 49 Comp. Gen. 727 (1970).

The protester raises a number of other questions concerning the implementation of Procurement Letter 240. For example, it asks whether the manufacturer is the company which makes the cloth or synthetic film for the ribbons or the company which winds the ribbon on the spools or inserts it into cartridges or the company which boxes and labels the ribbons. It also asks what "identical" means for purposes of this policy. To the extent that answers to these and similar questions may not be obvious from the language and purpose of Procurement Letter No. 240, they concern, in our opinion, normal administrative problems to be encountered and resolved by the issuing agency.

Accordingly, this protest is denied.

R. J. Keller
Deputy Comptroller General
of the United States